

(Guard file)

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD

SINGLE BENCH-II

APPEAL NO. AT-79/2019

M/s Jaffar Sani Construction Company Appellant

Versus

The Commissioner-II, SRB Respondent

Mr. Ghulam Shah Abbasi, Advocate for Appellant

Ms. Umi Rubab, AC-DR along with Mr. Muhammad Yasir, Assistant
Commissioner, SRB For Respondent

Date of hearing 15.01.2020

Date of Order 31.01.2020

ORDER

Mr. Imtiaz Ahmed Barakzai: This appeal has been filed by the Appellant challenging the Order-in-Appeal (hereinafter referred to as OIA) No.190/2019 dated 25.10.2019 passed by Commissioner (Appeals) in Appeal Number 176/2019 filed by the appellant against the Order-in-Original (hereinafter referred as the OIO) No.236/2019 dated 26.03.2019 passed by the Assistant Commissioner (Mr. Bakht Ali Dahio), SRB, Karachi.

2. The facts of the case as briefly stated in the OIO are that the appellant was registered with SRB for Sindh Sales Tax (SST) under the service category of "Construction" under Tariff Heading 9824.0000 classified under Second Schedule of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred as the Act).

It was contended in the OIO as under:-

On scrutiny of the profile it was revealed that the appellant had e-filed monthly returns for the tax period of January 2015 to February 2019 after the prescribed due date in term of Section 3, 8, 9, 17 and 30 of the Act read with rule 14 of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred as the Rules). Such non-compliance constitute offences punishable under S. No.2 of the Table to



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- c) M/s DG Khan Cement Company Limited versus The Federation of Pakistan and others 2004 SCMR 456 (2004 PTD 1179) Supreme Court of Pakistan, whereby it has been held that "Each and Every case was to be decided on its own merits as to whether the evasion or non-payment of tax was willful or mala fide, decision on which would depend upon question of recovery of additional tax. In the facts and circumstances of the case, the non-payment of the sales tax within tax period was neither willful nor it could be construed to be mala fide evasion of payment of duty, therefore, the recovery of additional tax as penalty or otherwise was not justified in law".
- iii) It was further stated in the OIO that "the appellant was continuously late filing the monthly Sales Tax returns since January, 2015 which was in violation of Section 30 of the Act, 2011. In this regard, it is mentioned that irrespective of the tax payable or not payable, the appellant was required to furnish the true and correct monthly Sales Tax return within the due date as prescribed under Section-30 of the Act, 2011. Accordingly, voluntary and consistent violation of Law attracts the penalties in the ambit of mala fide intentions. The A.O referred to decision of Honorable Lahore High Court cited 2016 PTD 643 in case of Commissioner Inland Revenue Versus Madina Cotton Ginners and Oil Mills wherein it was held as:-

"Section-26 of the Sales Tax Act, 1990 made it compulsory upon the registered person to file the return within due date irrespective of the fact that he paid the tax or not, or that during the tax period the supply was zero rated – words "indicating the purchase and the supplies" used in section 26 of the Sales Tax Act, 1990 unambiguously described non-filing of return within due date as an offence and provided that if any registered person did not file returns required under Section 26 of the Sales Tax Act, 1990, he shall be subject to penalty".

It was concluded in the OIO that the appellant had been continuously filing the monthly Sales Tax Returns after the due date as prescribed in the Act, without any genuine cause thus penalties under Serial no.2 of Section 43 of the Act were attracted and were imposed at Rs.632,333/- as confronted in SCN dated 15.01.2019.

4. The appellant had challenged the OIO before the Commissioner (Appeals) who vide OIA No.190/2019 dated 25.10.2019 has upheld the OIO whereby the tax payer was liable to pay the penalty of Rs.632,333/- as imposed by the AO.

5. The Appellant has challenged the OIA on the following grounds that:



- a) The learned Commissioner (Appeals-II), SRB erred in law by confirming the misinterpretation of the proviso prescribed in serial No.2 of section 43 of the Act.
 - b) The learned Commissioner (Appeals-II), SRB was not justified in confirming impugned charge of penalty at Rs.632,333/- under Serial No.2 of section 43 of the Act on e-filing SST Return late, without establishing the element of willfulness, malafide intention and mensrea on the part of Appellant.
 - c) That the learned Commissioner (Appeals-II), SRB was not justified in confirming the impugned OIO which was passed in a whimsical and stereo typed manner without application of legal mind and observing judicious norms of justice by ignoring precedents / celebrated judgments of superior courts of the country regarding propriety and application of penalty provisions.
 - d) That the learned Commissioner (Appeals-II), SRB was not justified in ignoring the Order passed by Double Bench-I, Appellate Tribunal, SRB, Karachi in case M/s Slingshot Vs. Assistant Commissioner (Unit-21), SRB, Karachi citation No. Appeal No.AT-92/2016 whereby imposition of penalty under serial No.2 of section 43 of the Sindh Sales Tax on Services Act, 2011 was reduced.
6. In his written synopsis the learned AC-SRB submitted as under:

- i) That the OIO and OIA were in accordance with the provisions of the Act. The Commissioner (Appeals) had given a detailed deliberation and upheld the assessment order.
- ii) The imposition of penalty under serial No.2 of the Table of section 43 of the Act, 2011 provides clear interpretation which states that penalty shall be imposed on the number of days / months default and not on the basis of number of unfilled returns.

Say for instance: In case a person fails to file returns for the tax period October-2017 and November-2017 within its due date and actually files both returns on 20th December, 2017. The calculation of penalty will base on fraction of 10,000 rupees if the default period is of more than 10 days, but if the default period is of less than 10 days, in that case 300 per day of penalty shall be imposed. Given below is the calculation of penalty that has to be imposed as per the language of serial No.2 of the Table in section 43 of the Act, 2011 in two different scenarios:

Tax period	Due Date	Return Submitted	Default Days	Penalty "Rs."
Oct-17	18-Nov-17	20-Dec-17	32	10,667
Nov-17	18-Dec-17	20-Dec-17	2	600

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- iii) The returns were late filed persistently for two year period which clearly indicates that the Appellant was not willing to file returns. This amounts to the *malafide* on the part of the Appellant and thus *mens-rea* is established.
- iv) The order imposing penalty was passed after proper discussions and do not suffer from any legal infirmity.

7. I have heard the learned representatives of the parties and perused the record made available before me.

8. The examination of legal provisions shows that there is no immunity or exemption available to any person not to file the return even if the person has not rendered any services during relevant tax period. However, the intention of legislature in the enactment of legal provision is always deterrent and corrections in nature.

It has been held in *Mehran Associates versus Commissioner Income Tax, Karachi 1993 SCMR 274* that ".....it is now well settled principle of law that if there appears any ambiguity in any provision of law the same is to be resolved in favor of tax payer".

9. This Tribunal in the case of *M/s Slingshot (Pvt.) Ltd. versus Assistant Commissioner (Unit-21), SRB* while dealing a case of imposition of penalty had held as under:

*"e) Besides, the learned counsel took the plea that the quantum of penalty imposed by the A.C. was not only harsh but unjustified and based on lack of proper interpretation of the penal provision. He argued that section 43(2) provided Rs.10,000/- only one time for an offence whereas the A.C. had compounded the penalty with every month for the whole period of default of non-filing of returns for 13 months, December 2014 to February 2016. It is noted that in this case the default of non-filing of monthly returns pertains to 13 returns for the months of December 2014 to February 2016. Penalty @ Rs.10,000/- for each not filed return works out to Rs.130,000/- in aggregate. However, the Assistant Commissioner multiplied the number of returns with the number of months for which it continued and imposed penalty of Rs.1,206,000/- which is too harsh and excessive. The intention of legislation in the enactment of penal provision is always deterrent and corrective in nature. Here also the phrase per month appears to be related to a return of sales tax which is to be filed every month. It is now well settled principle of law that if there appears any ambiguity in any provision of law the same has to be resolved in favor of tax payer as held in *M/s Mehran Associates Versus Commissioner Income Tax, Karachi 1993 SCMR page 274*. It was also held by Sindh High Court in *M/s Citi Bank versus Commissioner**

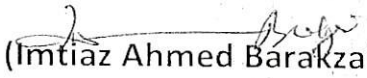


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Inland revenue that if two reasonable interpretations are possible, the one favoring the tax payer will be adopted. Multiplying the amount of penalty with number of months will be illogical and against the spirit of law".

10. In view of the above discussions and considering the decision of this Tribunal in identical case which has also been referred by the Appellant bearing Appeal No.AT-92/2016 dated 26.01.2017 the amount of penalty imposed at Rs.632,333/- is reduced to Rs.150,000/-.

11. The appeal is disposed of in the above terms.


(Imtiaz Ahmed Barakzai)
MEMBER TECHNICAL

Karachi

Dated: 31.01.2020

Copies supplied for compliance:-

1. The Appellant through authorized Representative.
2. The Assistant Commissioner (Unit-), SRB, Karachi.

Copy for information to :-

- 3) The Commissioner (Appeals), SRB, Karachi.
- 4) Office Copy.
- 5) Guard File.

Certified to be True Copy


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on


07/02/2020

Registrar

Order Dispatched on


07/02/2020

Registrar